No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1959

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

LEE RANKIN
Solicitor General

ROBERT A. BICKS
Assistant Attorney General

CHARLES H. WESTON
Special Assistant to the Attorney General

Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

Cases:

54-786—60—1

Cases—Continued

Statutes and Rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 788

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

The United States moves, pursuant to paragraph 1(a) of Rule 16 of the Revised Rules of this Court, that the appeal be dismissed, and it moves, in the alternative, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This appeal grows out of a suit brought by the United States against the American Society of Composers, Authors and Publishers (ASCAP) charging it with violating § 1 of the Sherman Act. ASCAP is an unincorporated association and its members are authors, composers and publishers of musical compo-

sitions. They assign to ASCAP a non-exclusive right to license the public performance of their copyrighted works, and it distributes among its members the fees or royalties collected for such licensing.

The Government's suit named as defendants ASCAP, its president, its secretary, and its treasurer. The parties having consented to entry of a judgment without adjudication of the issues, a consent judgment was entered on March 4, 1941. It regulated and restricted ASCAP's licensing activities, and also three aspects of its internal operations—distribution of receipts among members, voting for ASCAP's board of directors, and eligibility for membership (R. 37–47). Its prohibitions and requirements ran solely against ASCAP and those acting or claiming to act on its behalf.

On March 14, 1950, an Amended Final Judgment which superseded the 1941 judgment was entered by consent of the parties and without adjudication of any issue of law or fact. As before, the prohibitions and requirements of the judgment ran solely against ASCAP.[1] As before, the judgment dealt with ASCAP's licensing activities except for certain restrictions imposed (Sections XI, XIII, XV) as to distribution of receipts among members, their voting rights, and eligibility for membership (R. 106–124). A reservation of jurisdiction clause permitted "any of the parties" to the judgment to apply for its construction, modification, or enforcement, and permitted

[1] Section III made the judgment applicable to ASCAP's officers, directors and agents, "and to all other persons, including members, acting or claiming to act under, through or for such defendant."

the plaintiff to apply for vacation of the judgment any time after five years from its entry.

The United States received various complaints from ASCAP members concerning the 1950 judgment, and in 1956 it began an investigation which disclosed that certain judgment provisions should be made more specific (R. 321). It began negotiating with ASCAP in 1958, and after 30 to 40 conferences the parties agreed upon a proposed amendment of the 1950 judgment (R. 323A, 402).[2] In the Government's view, the changes accepted by ASCAP represented the "outermost limits" to be obtained by negotiation, and also the appropriate and fair limits, and accomplished the best results possible in the absence of lengthy and difficult litigation of very uncertain outcome (R. 353–354, 365–366).

The proposed consent judgment, amendatory of the 1950 judgment, was put before the district court on June 29, 1959. Chief Judge Ryan, who had been handling questions arising under the 1950 judgment, issued an order which fixed October 19, 1959, as the hearing date for action on the proposed amendment. The order provided that any person having an interest in the proceeding might then appear and make application to be heard in opposition to approval of the proposed amendment; and it directed ASCAP to mail to each of its members a copy of the court's order, of

[2] The most important of the agreed changes established detailed requirements for carrying out the provisions of the 1950 judgment relating to distribution of ASCAP's receipts among its members and election of its directors (R. 73–84; also R. 49–71, 88–105).

the 1950 judgment, and of the proposed amendment (R. 48).

ASCAP accordingly mailed to its members the foregoing documents and an analysis by its counsel of the proposed judgment changes, and held membership meetings in Los Angeles and New York at which it undertook to answer questions raised by its members concerning the proposed changes (R. 125–126 and attached exhibits).

At the hearing on October 19 and 20, 1959, Chief Judge Ryan not only heard counsel for the parties, the United States and ASCAP, but also heard as *amici* all of the eleven other persons who asked for a hearing (R. 297–603, 646–649). Counsel for the present appellants, who was heard at great length (R. 303–306, 434–518, 660–667), conceded that the proposed amendment, in the four respects which he criticized, constituted an improvement, even if slight, over the 1950 judgment (R. 450, 474, 495, 508).

The four appellants, each of which is a music publishing company and a member of ASCAP, had filed on October 13, 1959, a motion to intervene as of right (R. 175, 181, 185). At the October 19–20 hearing, the court, in denying this motion,[3] observed that ASCAP's management necessarily spoke for the association of which appellants were members; that no judgment, however framed, could possibly satisfy all of its members (approximately 6,400, R. 322); that, if testimony were taken, ASCAP would withdraw its consent and there would be nothing before the court; that it had

[3] Formal judgment denying the motion was entered on November 16, 1959 (R. 989–990).

no power to alter the terms of the proposed amendatory consent judgment; that its only alternatives were to approve or to disapprove such judgment; and that disapproval would leave the 1950 judgment in effect (R. 438–439, 442, 445–448, 461–462, 467, 510–512).

Since the proposed judgment provided (Section VII, R. 86) that it be vacated unless within three months from its entry ASCAP's membership had consented to a change in its articles of association, necessary to give effect to certain provisions of the proposed judgment, the court decided that it would not act prior to a decision by the members that they would approve the required change in ASCAP's articles of association (R. 318–319). The court stated that it wished to have the entire membership ballot on the question of approval or nonapproval of the proposed consent judgment (including the provisions not requiring change in the articles of association), such balloting to be conducted under the supervision of a member of the bar appointed by the court. As directed by the court, all ballots were to be mailed to this appointee and to be opened and tabulated in open court. There was to be separate tabulation of writer members and publisher members, and of subclassifications of each,[4] and these classifications and subclassifications were to be tabulated both on a per capita basis and on the weighted

[4] For writer members, the subclassifications were: (a) nonparticipating members, and, participating members, those with (b) one vote, (c) 2 to 5 votes, (d) 6 to 25 votes, (e) 26 to 50 votes, (f) 51 to 100 votes, (g) 101 to 250 votes, (h) over 250 votes (R. 719).

For publisher members, the subclassifications were those with (a) one vote, (b) 2 to 3 votes, (c) 4 to 5 votes, (d) 6 to 10 votes, (e) 11 to 20 votes, (f) over 20 votes (R. 720).

voting basis provided in ASCAP's bylaws (*i.e.*, weighted to reflect the members' varying contributions to ASCAP's catalogue). R. 640–641, 643, 645, 652–653, 655–656, 659, 1010–1014.

ASCAP agreed to, and did, pay $1,000 of the expense of mailing to its members a circular prepared by those advocating a negative vote on the proposed consent judgment, and also mailed all letters which individual members wished to have circulated with reference to this vote (R. 660–662, 735–736). In addition, prior to the balloting, special membership meetings were held on the West Coast and in New York to give ASCAP members further opportunity to discuss the proposed consent judgment (R. 992–1009).

When the votes were tabulated in open court on January 6, 1960, by independent auditors designated by the court, they reported that on a weighted basis 83% of all votes which had been cast were in favor of the proposed consent judgment, and that on a per capita basis (of those voting) approximately 60% of the publisher members and 70% of the writer members had voted "Yes" (R. 744–746). Their tabulation also showed that each of the eight writer and each of the six publisher subclassifications had voted in favor of the proposed judgment both on a per capita and a weighted vote basis (R. 1154).

The following day, the court, after hearing those who asked to be heard, including appellants' counsel, delivered an oral opinion which summarized the nature of the changes embodied in the proposed consent judgment and the reasons therefor (R. 806–813). The court concluded that this judgment, "although not a

panacea for all the alleged ills besetting the Society," does represent "definite improvement" over the existing judgment provisions, and "will serve to advance the antitrust purposes of the Government's suit and of the prior decrees" (R. 812–813). The court accordingly signed the proposed consent judgment (R. 816–830).

Appellants' appeal, filed on January 14, 1960, is from the order denying their motion for leave to intervene entered on November 16, 1959 (R. 877, 880). They did not appeal from the final judgment in the cause entered on January 7, 1960 (R. 877).

ARGUMENT

I

MOTION TO DISMISS

The appeal is under § 2 of the Expediting Act, 15 U.S.C. 29, which provides that in any civil antitrust action by the United States appeal from "the final judgment" of the district court lies only to this Court. We submit that the Court is without jurisdiction since appellants have appealed solely from the district court's interlocutory order denying their motion for leave to intervene, and have not appealed from "the final judgment" of the district court entered on January 7, 1960.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–546, this Court distinguished between the appeals from "all final decisions" of district courts authorized by 28 U.S.C. 1291, where decision of a claim of right, if the claim is sufficiently separable and independent from the main cause, may have fi-

nality even though the whole case has not been adjudicated, and appeals under a statute where Congress has allowed appeals "only from those final judgments which terminate an action." The appeal allowed by the Expediting Act is of the latter type. By that Act, "Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree." *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 558.

Appellants' failure to appeal from "the final judgment" in the cause is more than a mere technical defect. As their "Questions Presented" state (J. St. 4), they sought leave to intervene in order to urge changes in the "proposed" modification of the judgment.[5] Entry of the consent judgment of January 7, 1960, terminated the proceeding in which intervention was sought, and, since the appeal does not attack that judgment,[6] it moots the issues presented by the appeal.

In *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, the appeal was from denial of intervention in a Government civil antitrust action. The district court had entered a final judgment on the merits of the proceeding in which intervention was sought after the filing of the petition for appeal but before

[5] They were permitted to and did, urge such changes as *amici* (*supra*, p. 4).

[6] Not only have appellants not appealed therefrom, but their notice of appeal and jurisdictional statement request no relief against this judgment.

allowance thereof by the district court.[1] Although this Court discussed the question of whether the appellant was entitled to intervene, it viewed an order denying intervention as non-appealable under the Expediting Act. It said that such an order "is but an order in the cause and not the final judgment", and that one of the purposes of the Expediting Act in limiting appeal to "final decrees" was "to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust act * * *", 322 U.S. at 142. Nor do we think that the Court declared, even by way of *dictum*, that appeal from denial of intervention might lie by treating it as if taken from the district court's final judgment on the merits. It said (*ibid.*) that "*if* we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment" (emphasis supplied), but the hypothetical nature of this statement is shown by the fact that the Court then proceeded to dismiss the appeal (*id.* at 143).

Of the three cases cited by appellants in support of this Court's jurisdiction (J. St. 3), only *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, was an appeal under the Expediting Act, but there the appeal was from both the court's final judgment *and* the order denying intervention. In *Missouri-Kansas Pipe Line*

[1] The then Rules of this Court required these steps in appealing from the district court to this Court.

Co. v. *United States*, 312 U.S. 502, which appellants do not cite, right to intervene was grounded on the fact that the consent judgment entered in a Government antitrust action provided that Panhandle, the would-be intervenor, might "become a party" to the cause, and was thereby given a right to intervene in a proceeding to modify this judgment. Denial of intervention was held to be, with respect to this right, "a definitive adjudication, and so appealable." 312 U.S. at 508. But in the *Pipe Line* case, unlike here, no final judgment on the merits of the modification proceeding had been entered prior to the appeal from the order denying intervention or prior to this Court's decision on appeal.*

II

MOTION TO AFFIRM

Appellants attempted to intervene with respect to a proposed amendment, by consent of the parties, to a consent judgment entered in an antitrust action brought by the United States under § 4 of the Sherman Act. In their own words, their purpose was to urge "changes" in the proposed modification of the judgment then outstanding (J. St. 4). But change in the proposed modification, being dependent upon consent thereto by the parties, was something which the district court had neither the power to require nor the right to demand. The single issue before the court was approval or disapproval of the proposed modification. At the most the court could, as appellants im-

* The district court had rendered an "opinion" with respect to the proposed modification before the appeal was decided. 312 U.S. at 505.

pliedly urged, withhold its approval of the proposed modification until or unless the parties gave their consent to the further or different changes advocated by appellants.

The anomalous nature of the attempted intervention is highlighted by the fact that appellants did not seek leave to intervene either as parties plaintiff or as parties defendant.[9] In substance, they sought to intervene in the role of friends of the court, in which role they were given a full hearing. Obviously they could not intervene as parties plaintiff, at least in the absence of consent thereto by the United States; by statute, only the United States may bring a § 4 Sherman Act proceeding.[10] If they had been granted leave to intervene as of right as parties defendant, grant of such leave would have had to be based upon a finding that appellants will or may be bound by the proposed judgment modification. On that basis, their consent to change in the judgment would be necessary and, by withholding their consent, they could exercise power of veto over entry of any consent judgment modifying the 1950 judgment. Furthermore, if appellants, four of the some 6,400 ASCAP members, may intervene as of right as parties defendant, every other member and minority group of members has the same right and the same power to veto entry of any consent judgment.

It is scarcely necessary to point out that if the district court had recognized the right of intervention

[9] See their Pleading in Intervention (R. 175-181).

[10] Neither a State nor a private party may maintain an action under this section. *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48, 71; *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471. See also *infra*, pp. 19-20.

claimed by appellants, this would have paralyzed change, by way of consent, in the 1950 judgment. The effect would have been to prevent entry of a judgment which the court entered only after (1) all ASCAP members had been given full opportunity to appraise the over-all acceptability of the proposed judgment change, (2) a majority of every significant subclassification of the membership had voted in favor of the proposed change, (3) the court had patiently heard the objections of all dissident members, and (4) appellants had conceded that the proposed change represented some improvement over the existing judgment.

By the very nature of ASCAP's functions and objectives, and its structure as adapted thereto, the interests of particular categories of its members are in conflict with the interests of other categories respecting the matters as to which appellants' intervention application was directed—the voting rights of members and the basis for determining distribution of ASCAP's net receipts among its members. The greater the voting rights accorded to a particular category or categories, the smaller the proportion of the total accorded to others. Likewise, the larger the distribution of receipts to a particular category or categories, the less is available for other categories.

Appellants nevertheless urge that they are entitled to intervene as of right under Rule 24(a)(2) F.R. Civ. P., which grants such right—

> when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *.

Appellants concede (R. 188) that a party seeking to intervene as of right pursuant to this Rule must establish both that his interest may be inadequately represented by existing parties and that he may be bound by a judgment in the action. We believe that appellants do not satisfy either requirement.

A. Appellants appear to contend that they will be bound by any consent judgment modifying the 1950 judgment because (1) ASCAP will be bound by the modified judgment and (2) appellants are members of ASCAP. But the only respect in which ASCAP is bound by that judgment is that it specifies, while it remains in effect, the relief against ASCAP in the Government's antitrust action. With respect to any claim or cause of action which appellants may have against ASCAP, the judgment is not *res judicata* and appellants are not bound by the judgment. *Sutphen Estates, Inc., supra,* 342 U.S. at 21; *Credit Commutation Co. v. United States,* 177 U.S. 311. Indeed, appellants do not consider themselves so bound.[11]

[11] One of them, Pleasant Music Publishing Corp., is a plaintiff ("on behalf of itself and all other publisher members of" ASCAP) in a pending action against ASCAP in a New York State court which charges misfeasance, malfeasance, and other illegality as to matters within the scope of the antitrust judgment. *Lengsfelder et al. v. Cunningham,* Index No. 13344–1957 (Sup. Ct., New York County). The Second Amended Complaint in that action (filed 4/9/58) alleges, *inter alia,* that ASCAP's weighted voting system is "illegal, null and void" and that its board of directors "unlawfully discriminate" in the distribution of ASCAP's receipts among its members (pars. 40, 41).

If appellants are not bound, in the prosecution of such claims, by the 1950 consent judgment, they equally are not bound by the amendatory 1960 judgment.

The 1960 consent judgment amends or supplements particular sections or subsections of the 1950 judgment, but makes no change in the prior judgment as to those subjected to its prohibitions and requirements, namely, ASCAP and those acting "under, through or for such defendant" (*supra*, p. 2). Since appellants would not and could not be acting *on behalf of* ASCAP with reference to its internal affairs—the sole matters covered by the 1960 consent judgment—they are not bound by the judgment. While it might be urged that a judgment which binds ASCAP indirectly binds appellants by virtue of their membership in ASCAP, on the same reasoning each ASCAP member is, through the medium of ASCAP, a party, not a "stranger", to the action, and foundation for intervention, whether permissive or mandatory, is lacking. "Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented". Moore, *Federal Practice*, 2d ed., par. 24.02.

B. Appellants were properly denied intervention upon the further ground that they failed to establish the other requirement for intervention as of right under Rule 24(a)(2), *i.e.*, that their interest is not adequately represented by existing parties. As to representation of their interests by ASCAP, appellants, by becoming and remaining members of that association, assented to management of its affairs by

its board of directors as provided in its articles of association. The views of the board as to what judgment changes best serve the interests of the membership as a whole did not coincide with appellants' views, but this does not establish that their interest was not adequately represented by ASCAP.

We do not elaborate further on the adequacy of ASCAP's representation of appellants' interest, a matter which is more within the province of appellee ASCAP. However we note that the district court found (R. 812):

> The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members.

In any event, appellants' interest is, for the purposes of Rule 24(a)(2), represented and protected by the United States. In Government civil antitrust actions, the judgment entered is likely to affect the interests of non-defendants in a variety of ways—as competitors of a defendant, as purchasers or distributors of its goods, as licensees of its patents (as here), as members of a defendant unincorporated association, etc. The Attorney General or his delegate must and does formulate his request for relief in the light of such diverse interests and in a manner designed to achieve antitrust objectives and to bring about a feasible accommodation of producer, consumer, and other

interests, sometimes superficially in conflict but basically interlaced.

Just as institution of suit and the scope of the charges made therein are committed solely to the Attorney General, so in the conduct of litigation he must have the control which goes with being sole party plaintiff. To permit right of intervention on the theory that the Attorney General's conduct of particular antitrust litigation does not adequately represent the public interest therein would open the door to a multitude of intervenors, each clothed with power to introduce evidence, inject additional issues, and exercise right of appeal.[12] In short, the Attorney General is, in this class of litigation, "the guardian of the public interest in enforcing the antitrust laws". Cf. *Pipe Line* case, *supra*, 312 U.S. at 505. The presumption that he is responsibly performing his enforcement functions is not to be overcome by mere allegation of mistaken judgment respecting what constitutes appropriate and necessary relief.

The authorization by Congress of private antitrust suits for damages and for injunctive relief, and its aid to and encouragement of such suits by permitting recovery of triple damages and by giving the plaintiffs in private antitrust actions an important evidentiary advantage by reason of judgments of violation entered

[12] The resulting proliferation of appeals would be in the face of the purpose of the Expediting Act to limit appeals in this type of case to a single authoritative decision by this Court on the merits of the case.

in Government antitrust suits,[13] reinforces the conclusion that in suits brought by the United States the prosecuting arm is reserved to it alone. Private parties wishing to play the role of "quasi-attorneys general" in enforcing the antitrust laws can do so, not in Government suits, but in suits of their own under the ample remedies provided by the Clayton Act. See *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76 (S.D.N.Y.).

In the early case of *United States* v. *Northern Securities Co.*, 128 Fed. 808, 812 (S.D. Minn.), the court, in denying intervention as to the relief to be granted by the judgment in a Government antitrust action, said:

> It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as amici curiae, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be

[13] Any person injured by violation of the antitrust laws may bring an action to recover threefold his damages (§ 4 of Clayton Act, 15 U.S.C. 15), and any person may obtain injunctive relief against threatened loss or damage by a violation of these laws (§ 16 of Clayton Act, 15 U.S.C. 26), and in such suits a final judgment in a Government antitrust proceeding (not including consent judgments entered before testimony has been taken) shall be prima facie evidence against the defendants as to matters respecting which the judgment would be an estoppel as between the parties to the Government suit (§ 5 of Clayton Act, 15 U.S.C. 16).

wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise.

In *Bendix Home Appliances, supra,* the court denied intervention sought as a means of enforcing alleged requirements of a consent judgment entered in a Government antitrust action. The court, per Rifkind, J., said (10 F.R.D. at 76):

> It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure of the anti-trust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the anti-trust laws, or for the enforcement of decrees rendered under those laws.

The court further said (*id.* 77):

> The very fact that the Congress has made an adjudication in a Government suit prima facie evidence of certain facts in a private suit would indicate that it was not the intention of the Congress that private parties should be permitted to apply for private relief at the foot of a decree entered in a Government suit. 15 U.S.C.A. § 16. * * * Intervention, if allowed here, would tend to defeat the policy behind the distinction drawn by section 16 between litigated decrees and consent decrees.

In *United States* v. *Bearing Distributors Co.*, 1955 Trade Cases, par. 68,242 (W.D. Mo.), intervention sought in order to secure enforcement of a consent

judgment entered in a Government antitrust action, was denied. The court, per Mr. Justice Whittaker (then district judge), observed that the applicant's purpose was to "assume prerogatives of the Attorney General", and that in the action "instituted by the Government for public protection" the United States represented the applicant's interest.

In the instant case, three prior applications for intervention have been denied. Unreported order entered January 25, 1949 (Civ. 13-95, S.D.N.Y.); *United States* v. *ASCAP*, 11 F.R.D. 511 (1951); *United States* v. *ASCAP*, 1956 Trade Cases, par. 68,524 (S.D.N.Y.). In the 1951 ruling, the court said (11 F.R.D. at 513):

> The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest, in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws.

In numerous other cases, intervention for the purpose of modifying, implementing or enforcing the relief against defendants in Government civil antitrust actions have been denied.[14] Indeed, we are aware of no case in which, over the opposition of the United States, intervention was allowed in these cir-

[14] *United States* v. *Radio Corporation of America*, 3 F. Supp. 23 (D. Del.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D.N.J.); *United States* v. *Loew's, Inc.*, 1957 Trade Cases, par. 68,656 (S.D.N.Y.); *United States* v. *Paramount Pictures*, 334 U.S. 131, 176-178.

cumstances.[15] Intervention with Government acquiescence involves altogether different considerations because the Government, by its acquiescence or support, in effect adopts for itself the intervenor's contentions.

In the light of the consistent body of authority which we have cited, we submit that appellants' attack upon the district court's order denying intervention clearly presents no substantial issue warranting plenary review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed as not within this Court's appellate jurisdiction or, in the alternative, that the appeal presents no substantial question and the order of the district court denying intervention should be affirmed.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

APRIL 1960.

[15] We do not regard the *Pipe Line* case, *supra*, as a deviant since there the intervention was pursuant to right of intervention given by the court's earlier judgment and was in "vindication of the decree". 312 U.S. 508.

United States v. *Terminal Railroad Assn. of St. Louis*, 236 U.S. 194, 199, which appellants cite (J. St. 20), involved the right to be heard, not intervention as a party.

U.S. GOVERNMENT PRINTING OFFICE 1960